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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE, Plaintiff and Respondent, v. ZACHARY DAVID MACDONALD, Defendant and Appellant.	C070113 (Super. Ct. No. 11F3289)

Following a jury trial, defendant Zachary David MacDonald was convicted of attempted second degree robbery and possession of a deadly weapon, a billy, with two deadly weapon enhancements. The trial court sentenced defendant to three years in state prison and awarded 278 days of presentence credits (209 actual and 69 conduct).

On appeal, defendant contends there is insufficient evidence to support his conviction for possession of a billy, and he is entitled to additional conduct credits pursuant to the 2011 Realignment Legislation (Realignment Act) (Stats. 2011, ch. 15, § 1) as a matter of equal protection under the law. In a supplemental brief, defendant contends the trial court incorrectly calculated his custody credits. Agreeing with the

contention in defendant's supplemental brief, we shall modify the award of credits and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On June 12, 2011, Andrew Canfield was working as the clerk at a Circle K. At about 5:00 a.m., defendant entered the store carrying a bat and a knife and wearing a ski mask. He told Canfield, "empty the cash register, sir."

Canfield thought defendant was one of the other clerks playing a joke him. When he realized defendant was serious, Canfield picked up a mop and challenged defendant to a fight. Defendant put the knife in his pocket, took a pack of gum and a lighter, and left the store.

Canfield called 911 and described a vehicle, a green Ford Explorer, that defendant drove from the Circle K. Defendant was soon stopped by law enforcement while driving a green Ford Explorer. A black ski mask, some gum, a lighter and a sawed-off aluminum baseball bat were among the items found in defendant's Explorer. Canfield later made a field identification of defendant.

DISCUSSION

I. Possession of a Billy

Defendant contends there is insufficient evidence to convict him of possession of a billy because it must be made of wood and the bat in his possession was aluminum. We disagree.

Former Penal Code section 12020, subdivision (a)(1)[1] prohibits the possession of "any instrument or weapon of the kind commonly known as a blackjack, slungshot, billy,

[1] Undesignated statutory references are to the Penal Code. Effective January 1, 2012, section 12020 was repealed and reenacted without substantive change in section 22210 pursuant to the Deadly Weapons Recodification Act of 2010. (§§ 16000, 22210.) Unless

sandclub, sap, or sandbag." The device in question, an aluminum baseball bat, was modified by severing the bat at roughly one-half to three-quarters of the way from the top, removing approximately six inches. The bat was also covered with electrical tape. According to the officer who found the bat, a former college baseball player and current softball player, the device did not look like a normal baseball bat. The modified bat could be used as a deadly weapon; it was shortened, which would allow it to be easily concealed and more accessible. It could not be used to play baseball or softball.

Relying on several dictionary definitions of the term, defendant asserts that a "billy club" is defined as a short wooden stick used as a weapon. (See, e.g., Oxford Advanced Learner's Dict. of Current English (7th ed. 2005) p. 140 ["a short wooden stick used as a weapon by police officers"]; Merriam Webster's Collegiate Dict. (11th ed. 2006) p. 122 ["a heavy usu. wooden club; *specif*: a police officer's club]; Webster's Complete Desk Reference Book (1993) p. 33 ["a short wooden club used for protection or defense"].) Defendant also notes cases treating various wooden weapons as billy clubs. (See, e.g., *People v. Grubb* (1965) 63 Cal.2d 614, 619-620 (*Grubb*) [altered baseball bat]; *In re William J.* (1985) 171 Cal.App.3d 72, 75 [modified wooden dowel]; *People v. Canales* (1936) 12 Cal.App.2d 215, 217-218 [14 1/4-inch tapered club with nails driven into one end, and separate pick handle, 18 inches long, both billy clubs].)

People v. Mercer (1995) 42 Cal.App.4th Supp. 1 is instructive. There, the court held that a collapsible baton was a "billy." (*Id*. at p. Supp. 5.) The defendant in *Mercer* described the item at issue as a "truck antenna" and the policeman described it as a " 'weapon commonly known as a [collapsible] baton. The weapon, when extended by a flick of the wrist, is extended and used as a club. [¶] I have seen this weapon on several occasions and it is used by police and martial arts as an offensive weapon used to

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otherwise noted, subsequent statutory references are to the statutes in effect at the time of defendant's June 12, 2011 crime.

strike.' " (42 Cal.App.4th at p. Supp. 5.) The court held, "possession of such an item is proscribed by section 12020, subdivision (a). [¶] We note that Webster's New World Dictionary defines a 'billy' as 'a club or heavy stick; truncheon, esp. one carried by a policeman.' (Webster's New World Dict. (2d college ed. 1986) p. 141.) A 'truncheon' is defined as '1. a short, thick cudgel; club 2. any staff or baton of authority 3. [a] policeman's stick or billy . . . .' ([Webster's New World Dict.] p. 1527.) The item which appellant was carrying fits into these definitions." (*Mercer*, at p. Supp. 5.)

We are informed also by the Supreme Court's decision in *Grubb*, *supra*, 63 Cal.2d 614. The defendant in *Grubb* challenged the term "billy" in section 12020 as unconstitutionally vague. (*Grubb*, at p. 619.) The defendant claimed that since a billy can be a commonly used item such as "an orthodox baseball bat, a table leg, or a piece of lumber," a person of ordinary intelligence cannot know if he violates the statute. (*Id*. at pp. 619-620.) The Supreme Court construed section 12020 in accordance with its purpose, "to condemn weapons common to the criminal's arsenal; it meant as well 'to outlaw instruments which are ordinarily used for criminal and unlawful purposes.' " (*Grubb*, *supra*, at p. 620.) In short, section 12020 was enacted "for the salutary purpose of checking the possession of objects subject to dangerous use." (*Grubb*, at p. 620.)

The Supreme Court found, "The Legislature here sought to outlaw the classic instruments of violence and their homemade equivalents; the Legislature sought likewise to outlaw possession of the sometimes-useful object when the attendant circumstances, including the time, place, destination of the possessor, the alteration of the object from standard form, and other relevant facts indicated that the possessor would use the object for a dangerous, not harmless, purpose." (*Grubb*, *supra*, 63 Cal.2d at pp. 620-621.)

Since section 12020 "specifically includes those objects 'of the *kind* commonly known as a billy,' . . . [t]he Legislature thus decrees as criminal the possession of ordinarily harmless objects when the circumstances of possession demonstrate an

immediate atmosphere of danger. Accordingly the statute would encompass the possession of a table leg, in one sense an obviously useful item, when it is detached from the table and carried at night in a 'tough' neighborhood to the scene of a riot. On the other hand the section would not penalize the Little Leaguer at bat in a baseball game." (*Grubb*, *supra*, 63 Cal.2d at p. 621, citation omitted.)

Whether some dictionaries define "billy club" in reference to a wooden implement is irrelevant. For the purposes of section 12020, a billy club is not defined by what it is made of, but rather by what it is like. A device, either manufactured or modified, to be like a short club or truncheon, capable of being used as a deadly weapon, is a billy club for the purposes of section 12020. Defendant's modified aluminum bat was useless for its original purpose but readily employed as a deadly weapon—i.e., a shortened club or truncheon. It was therefore a billy club and defendant's contention must fail.

II. Realignment Act

Defendant committed his crime on June 12, 2011. He was sentenced on January 6, 2012.

The trial court calculated defendant's conduct credits under the September 28, 2010 revision of the presentence credit law, which provided that a defendant convicted of a serious felony was entitled to two days of conduct credit for every four days of presentence custody. (Former §§ 2933, 4019 (Stats. 2010, ch. 426, §§ 1, 2).) Defendant's conviction for attempted second degree robbery is a "serious felony." (§ 1192.7, subd. (c)(19), (39).)

The Realignment Act amended the law, entitling defendants to two days of conduct credits for every two days of presentence custody. (§ 4019, subds. (b), (c), (f).) The award of credits is not reduced by a defendant's current or prior conviction for a

serious felony. This provision applies prospectively, to defendants serving presentence incarceration for crimes committed on or after October 1, 2011. (§ 4019, subd. (h).)

Defendant argues that the prospective application of the conduct credit provisions of the Realignment Act violates his right to equal protection under the law. This claim was rejected by the California Supreme Court. (*People v. Lara* (2012) 54 Cal.4th 896, 906, fn. 9.) Applying *Lara*, we reject defendant's claim.

III. Conduct Credits

Defendant contends the trial court miscalculated his presentence conduct credits. The Attorney General agrees. We accept the concession.

Applying the September 28, 2010 amendments, the trial court ruled defendant was entitled to conduct credits equal to one-third of his 209 days in presentence custody, for a total of 69 days of conduct credit.

The trial court was wrong. As noted previously, defendant was entitled to two days of conduct credit for every four days of presentence custody. This is calculated by dividing the days in custody by four, discarding the remainder, and multiplying the result by two. (*In re Marquez* (2003) 30 Cal.4th 14, 25-26.) Properly calculated, defendant is entitled to 104 days of conduct credit, for a total of 313 days of presentence credit. We shall modify the award of credits accordingly.

"The circumstances of this case compel us to remind the parties of the availability of California Rules of Court, rule 8.272(c)(1) whereby the parties can stipulate to the immediate issuance of a remittitur."[2] (*People v. Crivello* (2011) 200 Cal.App.4th 612, 618.)

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[2] Pursuant to *People v. Fares* (1993) 16 Cal.App.4th 954, defendant's appellate counsel sent a letter to the trial court pointing out its error and requesting a modification of the award of conduct credits. In spite of the clear error in its miscalculation, the trial court

DISPOSITION

The judgment is modified to award defendant, in lieu of the 278 days originally received, with 313 days of presentence custody credits, consisting of 209 actual days and 104 conduct days. As so modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment and forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

BUTZ, J.

We concur:

BLEASE, Acting P. J.

HULL, J.

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nonetheless declined to modify the award of credits. Defendant subsequently sought, and was granted, calendar preference on appeal so the trial court's error could be corrected before defendant was entitled to release from prison, taking into account the corrected presentence credits. The trial court's refusal to correct its error has thus caused this court to expend scarce judicial resources to expedite our opinion and may force defendant to spend more time in custody than the law allows.